

Supreme Court, U. S.
F I L E D

JAN 24 1997

CLERK

NO 96-454

(6)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ASSOCIATION COMMERCIAL CORPORATION,
Petitioner,

v.

ELRAY RASH AND JEAN RASH,
Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

MOTION TO DISMISS FOR MOOTNESS

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Question Presented

Whether the case before the Court numbered 96-454 is now moot. Specifically, whether the Court can review an order confirming a plan of reorganization when the plan of reorganization has been totally accomplished and creditors paid sums petitioner claims it should have received.

Statement of the Case Revisited

Mr. Elray Rash owns and operates out of Lufkin, Texas, a Kenworth heavy truck to support himself and his wife Jean. He borrowed from the petitioner, Associates Commercial Corporation, to purchase the truck. Subsequently he and his wife filed a chapter 13 bankruptcy petition, promptly filing a proposed plan and thereafter complying with all requirements of the Bankruptcy Code, the rules and policies of the United States Bankruptcy Court for the Eastern District of Texas, and his proposed plan while awaiting confirmation and thereafter. He has never missed a payment.

In his proposed plan chapter 13 plan, Mr. Rash proposed to pay about \$28,000 to the Associates, an amount he believed to be equal to the fair market value of the truck. The Associates had filed a proof of claim claiming \$42,500 owed and a security interest in the truck in an equal amount. So Mr. Rash objected to the Associates' proof of claim under 11 U.S.C. §502. The Associates used the same argument to file an objection to Mr. Rash's chapter 13 plan under 11 U.S.C. §1325 (a) (5) (B).

In due course, the bankruptcy court called the §502 hearing. The bankruptcy court, sitting as finder of fact, found the value of the truck to be \$31,875.

Mr. Rash then incorporated that number in his chapter 13 plan. He has since paid that amount to the Associates and has completed his plan. The Associates appealed both the §502 judgment and the court's subsequent confirmation of Mr. Rash's chapter 13 plan based on the truck value determined in the §502 proceeding. Because Mr. Rash was not required to devote a full \$42,500 to his truck payments, he was able to commit to and accomplish a distribution to other unsecured creditors. He personally did not profit from the reduction in secured payments to the Associates.

Since the confirmation of the plan of reorganization the Associates has not stayed any of the orders of the bankruptcy court as they appealed those orders, first to the United States District Court for the Eastern District of Texas and then to the Fifth Circuit Court of Appeals. The Rashes continued to comply with the terms of their plan of reorganization. The plan was a five year plan. As is traditionally the case with chapter 13 plans of reorganization, priority debts were paid first out of funds available above and beyond those needed to pay the Associates and those needed to pay other secured creditors. Those priority debts were paid in full. But additional unsecured creditors were scheduled to be paid, and have been paid in the ordinary course of plan compliance until late November. At that point in time, although the Rash plan was scheduled to run until March, 1997, Mr. Rash was able to accumulate the funds to complete all sixty payments. This Court should note that Mr. Rash did not do so to raise the issue of mootness, since the plan would have been completed about the time of the due date for his reply brief on the merits anyway.

It is custom and procedure in the Eastern District of Texas, and common throughout the country with some variations, that on the receipt of all plan payments, the chapter 13 trustee delivers an accounting to the Bankruptcy Court with copies to all creditors showing that the debtors have made all plan payments and the eventual application of all funds received by the trustee. Mr. Michael Gross, the chapter 13 trustee, filed that accounting in late November of 1996. Again consistent with custom, on receipt of the final accounting, the clerk's office prepares and serves on all creditors a notice of receipt of the final accounting. All creditors, according to the notice, have twenty-five days to object to the details of the accounting. If no objection is received, according to the notice, the bankruptcy judge will be presented with the final order of discharge under 11 U.S.C. §1328 (a). The Eastern District of Texas clerk's

office issued its accounting notice on December 3, 1996. This Court should note that the execution by the bankruptcy judge of the final order of discharge under 11 U.S.C. §1328 (a) is mandatory, the only open fact question being whether all payments have been made, the accounting by the chapter 13 trustee being dispositive of that question absent a genuine fact issue concerning the accounting.

The Associates objected to the execution of the discharge order and the chapter 13 accounting on December 30, 1996. However, in their objection they raised no fact issue regarding the accounting and admit to this day that the Rashes have made all sixty payments called for in the plan of reorganization in the exact amounts called for in the plan. The procedure for objecting to a trustee's accounting is not inherently a matter requiring "notice and a hearing" under the Federal Rules of Bankruptcy Procedure, and their objection to the execution of the discharge order likewise does not require "notice and a hearing". The failure by the bankruptcy judge to execute the discharge order "as soon as practicable" would violate 11 U.S.C. §1328 (a) and furthermore the judge is under mandate from the Fifth Circuit, never stayed to enforce his final order confirming the Rash's plan of reorganization. On January 7, 1997, the bankruptcy judge executed the final order of discharge. The Associates has filed timely motions for rehearing.

If the Associates obtains the relief it seeks in its petition for writ of certiorari, then the Rashes will be required to pay out of pocket with no particular time deadline set, sums of money which they would not have had to pay to unsecured creditors since they had already committed all of their disposable income to the plan of reorganization pursuant to 11 U.S.C. §1325 (b). Including the stated rate of interest in the plan, the Associates has been paid \$39,426.66 on their allowed secured claim. There is no mechanism nor any realistic prospect of a refund from those the other creditors paid pursuant to a final and binding court order never stayed.

The chapter 13 trustee final accounting shows that the Rashes have paid \$8,516.49 to unsecured creditors, including the Associates for the undersecured portion of its claim.

The Rashes are raising this issue of mootness at the earliest practical moment. Motions for recall of the Fifth Circuit mandate and for stay of the final order of confirmation were pending before the Fifth Circuit and the bankruptcy court respectively as the Associates' petition for writ of certiorari was being submitted to this Court. The Rashes began to pay dividends to unsecured creditors which payments would have been made to the Associates with the higher truck value only after arguing the Fifth Circuit en banc appeal. Subsequently, after the Rashes had made their final plan payment, they needed confirmation from the chapter 13 trustee that they had actually made all required payments. That did not occur until December 30, 1996, when the Rashes then knew that only the Associates had raised an objection in reply to the bankruptcy clerk's notice and that the Associates was not raising an actual fact dispute regarding the trustee's accounting. The Rashes then decided to raise the mootness issue with this Court but before that could be accomplished they received the notice from this Court that the petition for writ of certiorari had been granted. In the telephone conference with this Court's clerk's office informing him of the granting of the petition, counsel for the Rashes informed the clerk of the mootness question and the imminent motion to dismiss.

This motion is not being filed to remove from the docket a case set for argument. The issue of mootness can be argued at the oral argument on the merits.

ARGUMENT FOR DISMISSING THE PETITION

1. THE CASE IS NOW TRULY LEGALLY MOOT.

This Court has never ruled on when an appeal of the confirmation of a bankruptcy plan of reorganization becomes moot. The Circuits have however developed an extensive and relatively consistent jurisprudence on the question. There is reasonable uniformity that an appeal of the confirmation of a bankruptcy plan of reorganization and any other related matters dealt with by the plan is moot when the plan has been substantially consummated. *In re Continental Airlines*, 75 F.3d 868 (3rd Cir. 1996); *Bennet v. Veale*, 60 F.3d 828 (6th Cir. 1995); *Matter of Manges*, 29 F.3d 1034 (5th Cir. 1994); *Matter of Specialty Equipment Corp.*, 3 F.3d 1043 (7th Cir. 1993); *In re Public Service Corp. of New Hampshire*, 963 F.2d 469 (1st Cir. 1992); *In re Club Associates*, 956 F.2d 1065 (11th Cir. 1992). Cases holding that the dispute before the Court has not been mooted also adopt these same principles, *In re Flagstaff Realty Assoc.*, 60 F.3d 1031 (3rd Cir. 1995); *In re Seidler*, 44 F.3d 945 (11th Cir. 1995); *In re Public Service Co. of New Hampshire*, 43 F.3d 763 (1st Cir. 1995); *In re CGI Industries*, 27 F.3d 296 (7th Cir. 1994); *National Tax Credit Partners, L.P. v. Havlik*, 20 F.3d 705 (7th Cir. 1994). Only one case with extenuating circumstances departs from these principles, *In re Chateaugay Corp.*, 10 F.3d 944 (2nd Cir. 1993).

The principle, equitable mootness, can be simply stated. Reorganizations, all of which involve substantial impairment of the rights of many parties, need to reach completion and finality.

In the case at bar, the Associates would throw out five years of efforts by the Rashes, have the Rashes start all over again making extra payments to the Associates, jeopardize the finality of distributions to unsecured creditors or alternatively force the Rashes into either a plan which

exceeds the maximum five year chapter 13 plan payment period or forces them to pay funds in excess of their net distributable income, all without a stay, all without a bond, all without any fair arrangement to accommodate the legitimate interests of the Rashers in their own reorganization and the other creditors in that reorganization.

CONCLUSION

For these reasons, the Court should dismiss the Associates' petition for a writ of certiorari as moot.

Dated January, 1997

Respectfully submitted,

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